Kellogg Brown & Root LLC and Molycorp, Inc. *and* David L. Totten. Cases 31–CA–140948 and 31–CA–145896

August 2, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On April 4, 2016, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondents filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc*., 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that Respondent Kellogg Brown & Root, LLC (Kellogg) violated Section 8(a)(1) of the National Labor Relations Act by maintaining a Dispute Resolution Program Plan and Rules, incorporated in its Dispute Resolution Agreement (collectively, the "Policy"), that requires employees, as a condition of employment, to waive their right to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found that Respondents Kellogg and Molycorp, Inc. violated Section 8(a)(1) by enforcing the Policy.

Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at __, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at __, 138 S. Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil*, we conclude that the complaint must be dismissed.[1]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 2, 2018

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John F. Ring, Chairman

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Lauren McFerran, Member

_____

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nikki N. Cheaney, Esq., for the General Counsel.

Howard S. Linzy, Esq. & Thomas J. Woodford, Esq. (The Kullman Firm, PLC), for the Respondents.

Leonard H. Sansanowicz, Esq. (Feldman Browne Olivares, APC), for the Charging Party.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving an alleged unlawful mandatory individual arbitration provision. On December 31, 2015, the General Counsel, the Charging Party (David Totten), and the Respondents (Kellogg Brown & Root LLC and Molycorp, Inc.) filed a joint motion and stipulation of facts requesting that the allegations be decided without a hearing based on the stipulated record. The motion was granted, and the General Counsel and the Respondents thereafter filed briefs on March 25, 2016.[1] Based on those briefs and the entire stipulated record, for the reasons set forth below I find that the Respondents unlawfully maintained and/or enforced the subject arbitration provision as alleged.

Kellogg Brown & Root provides engineering, procurement, and construction services, and maintains an office and place of business in Houston, Texas. Molycorp manufactures custom rare earth and metal products, and has an office and place of business in Greenwood Village, Colorado, and a facility in Mountain Pass, California.[2]

[1] We therefore find no need to address other issues raised by the Respondents' exceptions.

[1] See Sec. 102.35(a)(9) of the Board's rules. Totten did not file a brief. However, like the General Counsel and the Respondents, he attached a short statement of position to the joint motion and stipulation of facts.

[2] Respondents do not dispute, and the record establishes, that they satisfy the Board's jurisdictional commerce standards.

Totten was employed by Kellogg until June 2013, when he was terminated pursuant to a reduction in force. A year later, in July 2014, he filed a class-action lawsuit in California superior court against both Kellogg and Molycorp, which he alleged was his joint employer, seeking unpaid wages and other relief under various California statutes.Respondents subsequently removed the action to federal district court. A month later, on September 25, 2014, they jointly moved the district court to compel arbitration of Totten's individual wage claims and to dismiss the purported class and representative claims. They did so pursuant to a provision in Kellogg's Dispute Resolution Program Plan & Rules, which is incorporated into a Dispute Resolution Agreement that Kellogg has required all employees, including Totten, to sign as a condition of employment. The provision states that all disputes[3] shall be resolved through individual arbitration, thereby prohibiting employees from asserting claims in a class or representative capacity in either judicial or arbitral forums.

Citing *D. R. Horton*, 357 NLRB 2277 (2012), and *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), the General Counsel alleges that Kellogg and Molycorp thereby violated Section 8(a)(1) of the National Labor Relations Act. Specifically, the General Counsel alleges that Kellogg violated the Act by maintaining the individual arbitration provision as a condition of employment, and that both Kellogg and Molycorp violated the Act by seeking to enforce the provision against Totten in his class-action suit.

Respondents dispute the allegations, arguing that *D. R. Horton* and *Murphy Oil* were wrongly decided and rejected in relevant part on appeal by the Fifth Circuit, [4] the jurisdiction where Kellogg maintains its principal place of business. However, the Board fully explained in *Murphy Oil* why it continued to adhere to *D. R. Horton* notwithstanding the Fifth Circuit's refusal to enforce that decision. And while the Fifth Circuit subsequently refused to enforce *Murphy Oil* as well, it acknowledged the Board's right not to acquiesce to the circuit court's decision in light of the multiple venue options for obtaining review of Board orders under Section 10(f) of the Act.[5] In any event, administrative law judges must follow Board precedent unless and until it is overruled by the Supreme Court. *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004).

Respondents also argue that the General Counsel's allegations should be dismissed for several other reasons. As discussed below, however, these arguments are likewise contrary to Board precedent.

(1) *Timing of Totten's charges*. Respondents argue that the complaint should be dismissed because Totten did not file the 8(a)(1) charges with the Board until November 2014 and February 2015, well over 6 months after he initially signed the dispute resolution agreement in January 2012. However, the Board has repeatedly rejected this argument in previous *D. R. Horton/Murphy Oil* cases, holding that an 8(a)(1) violation may be found where, as here, an unlawful policy has been maintained and/or enforced within 6 months of the charge, regardless of when the policy became effective or was acknowledged by the employee. See *Cowabunga, Inc*., 363 NLRB No.133, slip op. at 2 (2016); *Fuji Food Products, Inc*., 363 NLRB No. 118, slip op. at 1 fn. 1, 7 (2016); and *Employer's Resource*, 363 NLRB No. 59, slip op. at 1 fn. 2, 5 fn.3 (2015), and cases cited there.

(2) *Totten's employee status*. Respondents also argue that the complaint should be dismissed because Totten was terminated for reasons unrelated to any current labor dispute or unfair labor practice, and was therefore not an "employee" of Kellogg within the meaning of Section 2(3) of the Act when they sought to enforce the arbitration provision in his class-action suit. However, the Board has repeatedly rejected this argument in prior cases too, holding that former employees are protected by the Act and may file unfair labor practice charges over their former employer's posttermination maintenance and enforcement of an individual arbitration policy, even if they were terminated for reasons unrelated to any labor dispute or unfair labor practice. See *Cowabunga*, slip op. at 2; *Fuji Food Products,* slip op. at 1 fn. 1, 7; *Employer's Resource,* slip op. at 1 fn. 2, 6; and *Cellular Sales of Missouri*, 362 NLRB No. 27, slip op. at 6–7 (2015).

Respondents assert that Totten was not an employee when he worked for Kellogg, but was instead employed as a supervisor. See Respondents' answer, General Counsel Exhibit 1(n), par. 3 (Totten "is not now and was not an employee of [Kellogg] within the meaning of the Act during any relevant time periods"), and par. 6 ("when [Totten] was last employed by [Kellogg] in June 2013 he was a supervisor with the meaning of the Act"); and Respondents' brief at 3. However, Respondents, which have the burden of proving supervisory status under Section 2(11) of the Act (see *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–713 (2001)), have failed to establish that Totten worked as a supervisor throughout his employment. Indeed, Respondents' August 27, 2014 statement in support of removing Totten's class action complaint to federal court stated that Totten "worked as a rigger and rigging foreman at the Molycorp Mountain Pass rare earth facility in Mountain Pass, California from January 16, 2012 through June 17, 2013," earning $26–$33 per hour (Jt. Exh. 5, at 8). Thus, by Respondents' own admission, Totten worked as a rigger part of the time he was employed.[6] In any event, even if Totten was designated a "rigging foreman" throughout his employment, it is well settled that an individual's job title alone is insufficient to establish supervisory status. *Heritage Hall*, 333 NLRB 458, 458–459 (2001). See also *du Pont, E.I., de Nemours & Co.*, 89 NLRB 119 (1950) (finding that the employer's rigger foreman was an employee rather than a supervisor).

[3] NLRB unfair labor practice charges and proceedings are excepted.

[4] *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir 2013); and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[5] 808 F.3d at 1018. See also *Murphy Oil*, 361 NLRB No. 72, slip op. at 2 fn. 17; and *D. L. Baker, Inc*., 351 NLRB 515, 529 fn. 42 (2007) (discussing the Board's nonacquiescence policy).

[6] Respondents' August 27, 2014 statement to the district court, which the parties made part of the stipulated record in this proceeding, may properly be considered as an evidentiary admission under FRE 801(d)(2). See generally 30B Fed. Prac. & Proc. Evid. sec. 7026 (2014 ed., database updated April 2015); and *Spurlino Materials, LLC*, 357 NLRB 1510 fn. 1, 1516 n. 20 (2011), enfd. 805 F.3d 1131 (D.C. Cir. 2015).

Respondents' brief also argues that the General Counsel failed to allege and prove that Totten continues to seek paid employment, citing *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971) (retirees who have abandoned the workforce are not employees under the Act); and *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999) (unpaid staff are not employees under the Act). However, Respondents did not raise this issue in either their answer to the complaint or their statement of position filed with the parties' stipulation. Nor is the issue, or any fact relevant to it, set forth in the stipulation itself. Respondents cite no Board precedent requiring the General Counsel in such circumstances to present evidence or prove that a former employee continued to seek paid employment. And what precedent there is indicates otherwise. See *Fuji Food Products*, slip op. at 7 fn. 8 (noting, in rejecting the employer's argument that the charging party was no longer an employee under 2(3) of the Act, that the employer did not contend that she had abandoned the workforce after her employment ended); *Toering Electric Co*., 351 NLRB 225, 233 (2007) (holding that, in hiring discrimination cases, the General Counsel does not have to prove the applicant had a genuine interest in working for the employer unless the employer puts it at issue by presenting evidence that creates a reasonable question regarding the applicant's actual interest); and *Central Transport, Inc*., 247 NLRB 1482, 1482–1483, JD fn. 1 (1980) (finding, in a hiring discrimination case, that the General Counsel did not have to present evidence that the alleged discriminatee was an employee rather than an independent contractor, as the employer had not raised this issue in its answer or at the hearing), cited with approval in *BKN, Inc*., 333 NLRB 143, 144 fn. 3 (2001), reaffirmed *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 2 (2014) (as with supervisory status, the burden is on the party asserting that an individual is an independent contractor rather than an employee to prove it). See also *Boeing Company*, 362 NLRB No. 195, slip op. at 1 fn. 1 (2015) (finding, in a stipulated-record case, that the employer waived its right to challenge the authority of the General Counsel to prosecute the case, as the employer failed to raise the argument in its answer or pleadings, and the stipulation identified only three issues in dispute, none of which questioned the General Counsel's authority).

(3) *Totten's concerted activity*. Respondents also argue that the allegations should be dismissed because Totten did not engage in any concerted activity protected by the Act. However, again, the Board in prior cases has repeatedly rejected this argument, holding that the filing of an employment-related class or collective action by an individual constitutes concerted activity under the Act. See *Cowabunga,* slip op. at 2; *Fuji Food Products,* slip op. at 1 fn. 1; and *Employer's Resource*, slip op. at 1 fn. 2, 7, and cases cited there.

(4) *Molycorp's employer status*. Finally, Respondents argue that the allegations against Molycorp should be dismissed because Totten was never actually employed by Molycorp. However, the Board in prior cases has repeatedly rejected this argument as well, holding that an employer may properly be held accountable for restricting or interfering with an employee's rights under the Act regardless of whether it is or was an employer of that employee. See *Employer's Resource*, slip op. at 1 fn. 2, 6 (2015); and *Countrywide Financial Corp*., 362 NLRB No. 165, slip op. at 1 fn. 2 (2015), citing *New York New York Hotel & Casino*, 356 NLRB 907, 911 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013). Under that precedent, Molycorp's alleged enforcement violation under *D. R. Horton* and *Murphy Oil* is sufficiently established by the stipulated facts that it is an employer engaged in commerce generally and that it joined in Kellogg's motion to dismiss Totten's class and representative claims pursuant to the unlawful dispute resolution provision.[7]

CONCLUSIONS OF LAW

1. Respondent Kellogg has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

a. Maintaining, as a condition of employment, a mandatory individual arbitration policy that prohibits employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums; and

b. Seeking to enforce the foregoing arbitration policy against Totten since September 2014.

2. Respondent Molycorp has likewise engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by seeking to enforce the foregoing arbitration policy against Totten since September 2014.

REMEDY

Consistent with *D. R. Horton* and *Murphy Oil*, Respondent Kellogg will be required to rescind or revise the Dispute Resolution Program Plan & Rules and the Dispute Resolution Agreement containing the unlawful mandatory arbitration provision, and to notify Totten and other current and former employees who signed or were subject to the plan or agreement that it has done so.

With respect to Totten's class action suit, I take judicial notice under FRE 201 that the following events occurred after the parties filed their joint motion and stipulation of facts in this proceeding:

(1) On January 22, 2016, the federal district court (Dolly M. Gee, J.) granted the Respondents' motion to compel arbitration to the extent Totten asserted individual claims, but denied their motion to dismiss Totten's class claims (*Totten v. Kellogg Brown & Root, LLC* et al., --- F.Supp.3d --- 2016 WL 316019 (C.D. Cal. Jan. 22, 2016)); and

(2) On February 22, 2016, Respondents filed an appeal from the district court's order with the Ninth Circuit (Docket No. 16–55260), which remains pending.

Respondents Kellogg and Molycorp will therefore be required to notify the appeals court that Kellogg has revised or rescinded the dispute resolution plan and agreement, and that Respondents no longer oppose Totten's class or representative claims on the basis that they are barred by the mandatory indi-

[7] It is therefore unnecessary to address Totten's contention that he was jointly employed by Kellogg and Molycorp. Although the position statement he filed with the parties' joint motion and stipulation cites several facts supporting a joint-employer finding, none of those facts are included in the parties' stipulation or properly the subject of judicial notice.

vidual arbitration provision therein. See *Ross Stores*, 363 NLRB No. 79 (2015).

Respondents will also be required to reimburse Totten for all reasonable expenses and legal fees, with interest, incurred in opposing both their motion to dismiss the class and representative claims and their appeal from the district court's adverse ruling on the motion. Interest shall be computed and compounded daily as set forth in *New Horizons*, 283 NLRB 1173 (1987) and *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Finally, as requested in the General Counsel's complaint, Respondents will be required to post a notice to employees; Kellogg at all locations where the dispute resolution plan and/or agreement have been in effect, and Molycorp at its facility in Mountain Pass, California. Respondents will also be required to distribute the notice electronically, including by email, if they customarily communicate with employees by such means. See *J. Picini Flooring*, 356 NLRB 11, 14 (2010). And they will be required to mail the notice in the event they have gone out of business or have closed or ceased providing services at a particular facility covered by the order. See, e.g., *SBM Management Services*, 362 NLRB No. 144, slip op. at 1 n. 3 (2015).

The General Counsel's complaint requests an unconditional notice-mailing remedy, i.e. that Respondents be required to mail the notice to their employees regardless of whether Respondents have gone out of business or have closed or ceased providing services at a particular facility. However, the Board considers this to be an extraordinary remedy. See *J. Picini Flooring*, above. And the General Counsel cites no extraordinary circumstances justifying it here. Although the General Counsel's brief (pp. 10–11) addresses why the other remedies requested in the complaint are appropriate, it conspicuously fails to address the requested notice-mailing remedy. The Board has not routinely included this remedy in other cases under *D. R. Horton* and *Murphy Oil* (notwithstanding that it would be a relatively simple matter for respondents to include a copy of the Board's notice when they notify their employees that the unlawful arbitration provision has been rescinded or revised). Nor has the Board routinely included the remedy in cases arising in the construction industry. See *Six Star Janitorial*, 28–CA–023491, 2014 WL 28670 (Jan. 2, 2014), citing *Engineering Contractors*, 357 NLRB 1553 (2011), and *McCarthy Construction Co.*, 355 NLRB 50, 53–54 (2010), incorporated by reference 355 NLRB 365 (2010).

Accordingly, based on the foregoing and the record as a whole, I issue the following order.[8]

ORDER

A. The National Labor Relations Board orders that Respondent Kellogg Brown & Root LLC, Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration provision that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration provision in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration provision does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration provision in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised provision.

(c) Notify the U.S. Court of Appeals for the Ninth Circuit in *Totten v. Kellogg Brown & Root, LLC* et al., Docket No. 16–55260, that it has rescinded or revised the mandatory arbitration provision upon which it based its motion to dismiss Totten's class and representative claims, and inform the court that it no longer opposes the claims on the basis of the arbitration provision.

(d) Reimburse Totten for any reasonable attorneys' fees and litigation expenses that he may have incurred in the above action in opposing the Respondent's motion to dismiss his class and representative claims and Respondents' appeal of the district court's denial of that motion.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A" at all of its facilities where the arbitration provision has been maintained.[9] Copies of the notice, on forms provided by the Region, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or has closed or ceased doing business at a facility covered by this order, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at those facilities at any time since April 17, 2014.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that Respondent Molycorp, Inc., Greenwood Village, Colorado, and Mountain Pass, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing a mandatory arbitration provision that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Inform the U.S. Court of Appeals for the Ninth Circuit in *Totten v. Kellogg Brown & Root, LLC* et al., Docket No. 16–55260, that it no longer opposes Totten's class and representative claims on the basis of the mandatory arbitration provision maintained by Kellogg Brown & Root LLC.

(b) Reimburse Totten for any reasonable attorneys' fees and litigation expenses that he may have incurred in the above action in opposing the Respondent's motion to dismiss his class and representative claims and Respondents' appeal of the district court's denial of that motion.

(c) Within 14 days after service by the Region, post at its Mountain Pass, California facility copies of the attached notice marked ""Appendix B." Copies of the notice, on forms provided by the Region, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or has closed or ceased doing business at the facility covered by this order, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at that facility at any time since September 25, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 4, 2016

APPENDIX A
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory arbitration provision that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unlawful mandatory arbitration provision in all of its forms, or revise it in all of its forms to make clear that the arbitration provision does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration provision in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised provision.

WE WILL notify the U.S. Court of Appeals for the Ninth Circuit in *Totten v. Kellogg Brown & Root, LLC* et al., Docket No. 16–55260, that we have rescinded or revised the mandatory arbitration provision upon which we based our motion to dismiss David Totten's class and representative claims against us, and inform the court that we no longer oppose the claims on the basis of the arbitration provision.

WE WILL reimburse Totten for any reasonable attorneys' fees and litigation expenses that he may have incurred in the above court proceeding in opposing our motion to dismiss his class and representative claims and our appeal of the district court's denial of that motion, with interest.

KELLOGG BROWN & ROOT LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-140948 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enforce a mandatory arbitration provision that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify the U.S. Court of Appeals for the Ninth Circuit in *Totten v. Kellogg Brown & Root, LLC* et al., Docket No. 16–55260, that we no longer oppose David Totten's class and representative claims against us on the basis of the mandatory arbitration provision maintained by Kellogg Brown & Root LLC.

WE WILL reimburse Totten for any reasonable attorneys' fees and litigation expenses that he may have incurred in the above court proceeding in opposing our motion to dismiss his class and representative claims and our appeal of the district court's denial of that motion, with interest.

MOLYCORP, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-140948 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.